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MICHAEL ROBAK, JR.

In the Supreme Court of the United States

No. 73-59

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

LARRY LUKE, Individually, and as Special Administrator of the Estate of LISA LUKE, deceased, and KATHLEEN LUKE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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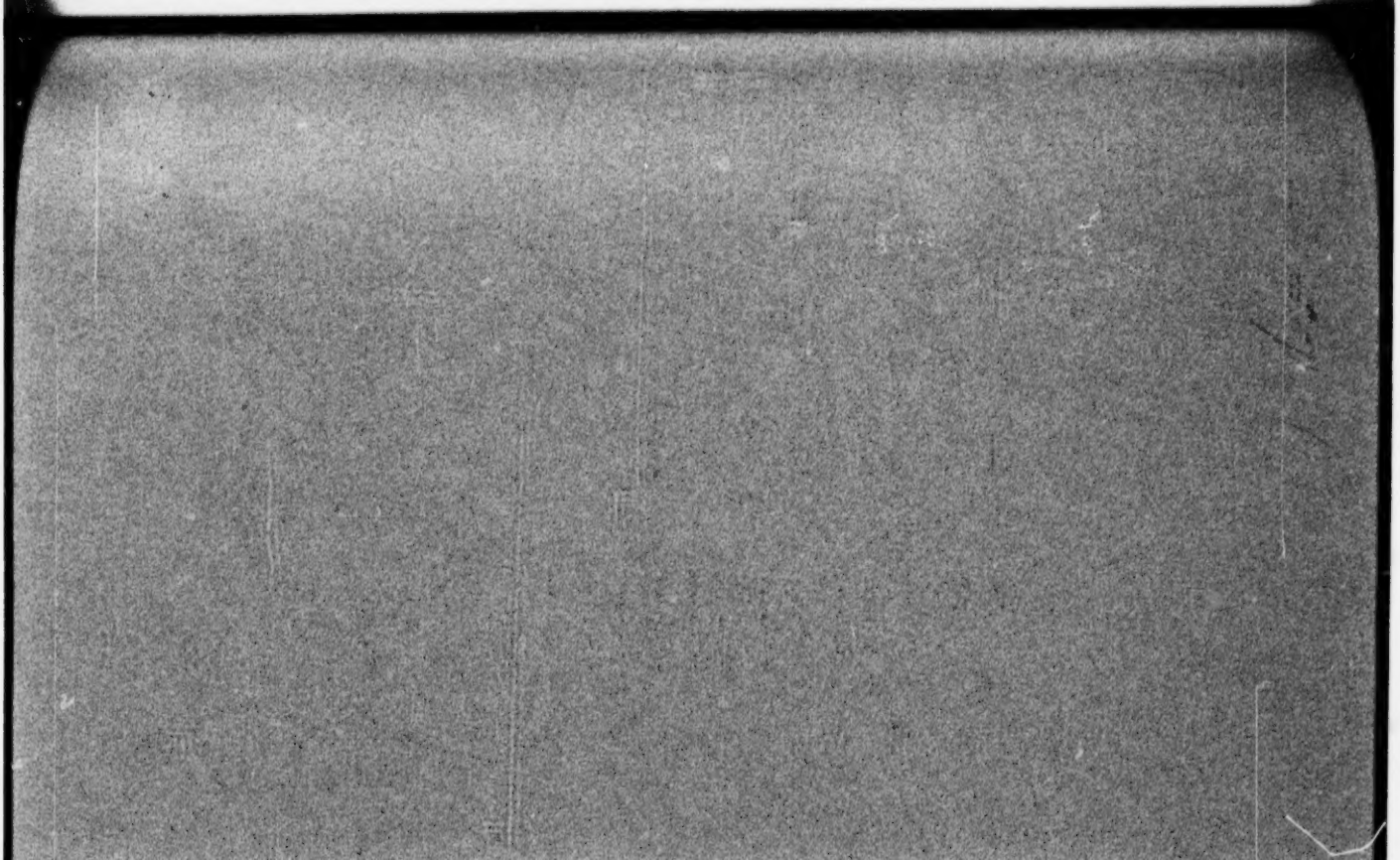

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The dissenting opinions filed by the 8th Circuit Court of Appeals on re-hearing en banc, and the lack of any numerical majority of judges concurring, illustrates the divergence of opinion in this case and the necessity for review by this Court. Of the nine judge Court, before whom the re-hearing en banc occurred, three judges dissented outright; and of the six judges concurring in the result of the principal opinion, three judges specifically refused to concur in the express rationale of the remaining three judges. (Appendix D, pages A26 to A34).

The mere fact that the manner of the division of the judges in expressing their respective opinions on re-hearing en banc resulted in technical affirmance of the first re-hearing does not reduce the necessity for review by this Court in any way; in fact, it emphasizes such necessity.

Involuntary payment of a judgment does not make the points presented by the Petition for Certiorari moot nor in any way obviate the necessity of having the disputed principles of law resolved by this Court. The judgment was paid upon execution. It is an established rule that such compliance with a judgment by payment or performance does not bar review by an appellate court. (*Dakota County* v. *Glidden*, 113 U.S. 222, 5 S.Ct. 428, 28 L.Ed. 981 (S.Ct., 1885); *Chicago Great Western Railway Co.* v. *Beecher*, 150 F.2d 394 (8th Cir., 1945); and *Leader Clothing Co.* v. *Fidelity and Casualty Company of New York*, 227 F.2d 574 (10th Cir., 1955).

The language of the 8th Circuit Court of Appeals on this subject is appropriate as expressed in *Chicago Great Western* v. *Beecher*, supra, l.c. 397:

> "It is an established rule in the Federal Courts that compliance with a judgment or decree of a Court by payment of the judgment or performance of the decree does not bar an appeal from such judgment or decree where repayment or restitution may be enforced (citations omitted) and upon reversal of the judgment by an Appellate Court the trial court should compel restitution as far as possible where it is within its power to do so." (Citations omitted)

Petitioner is entitled to restitution but, in any event, this point does not affect in any way the necessity for review. The issues presented to this Court are of over-

riding importance to the public and to the insurance industry.

Petitioner agrees with Respondents that Petitioner here is not requesting that this Court review the issue of the basic coverage provided by the insurance contract. The issues presented concern the question of whether or not an insurance carrier should be held to excess over the coverage limits provided by contract under the principles stated by three judges of the 8th Circuit Court of Appeals on re-hearing. The conflict among the circuits on the issues of excess coverage and what principles are to be applied must be finally decided by this Court so that all insurance carriers will have proper guidance in making decisions which affect underwriting practices, premiums charged, the general availability of insurance to the public, and the property rights arising out of contracts between private citizens. Involuntary payment of a judgment does not preclude nor make moot these issues.

Respondents contend that there is no conflict between the present principal opinion of the 8th Circuit Court of Appeals in the instant case and the previous opinions of the 5th Circuit Court of Appeals in *Beck* v. *Pennsylvania National Mutual Casualty Insurance Company*, 429 F.2d 813 (5th Cir., 1970), and the 10th Circuit Court of Appeals in *State Farm Mutual Automobile Insurance Company* v. *Skaggs*, 251 F.2d 356 (10th Cir., 1957). In *State Farm Mutual Insurance Company*, and *Beck*, supra, the decisions were based upon state law. (Respondent's Brief, page 2). Respondents overlook that it is the conflict in the principles and the manner in which the principles are applied which is in question here. It is the conflict between the different circuits in applying the principles in which state law is found, if not previously decided by the highest court of the various states, or the principles used to interpret the decision of the highest court of the state sometimes to

actually obviate the decision of that highest court or, in the instant case, to reach a contrary result which should be here resolved. The dissenting opinion of Judge Bright in the 8th Circuit Court of Appeals on re-hearing agrees with Petitioner's position that there is a conflict between the circuits. (Appendix D, pages A31, A32).

Respondents contend that the majority opinion of the 8th Circuit Court of Appeals allowed recovery in tort. (Respondents' Brief, pages 3 and 5). The 8th Circuit Court of Appeals in its initial opinion filed November 2, 1972, permitted recovery for excess of the policy limits on the ground that S.D.C.L. 21-2-1 would be interpreted in the same manner as Section 3300 of the California Civil Code was interpreted in *Comunale* v. *Traders & General Insurance Company*, 328 P.2d 198 (S.Ct.Cal., 1958). S.D.C.L. 21-2-1 is a South Dakota statute entitled "General Measure of Damages for Breach of Contract—Uncertain Damages Not Recovered" and pertains solely to damages allowed to be recovered for breach of contract. In its initial opinion, the 8th Circuit Court of Appeals authorized a recovery in excess of the contractual policy limits upon a *breach of the insurance contract.* (emphasis supplied). No mention was made by the 8th Circuit in either its initial opinion or its opinions on re-hearing of permitting recovery in tort.

The Reply Brief of Respondents attempts to evade the question of the violation of Article I, Section 10, of the Constitution of the United States and the other points raised in the Petition for a Writ of Certiorari by stating Respondents' version of the record and contending that Petitioner's conduct shows a gross disregard for the interests of its assured. Respondents' claims of bad faith or unreasonableness on the part of Petitioner are not issues presented by or involved in the Petition for a Writ of

Certiorari. Those issues are not before this Court for consideration in whether or not to grant the request for review. But if such issues were before this Court, Respondents' statements are not justified by the record.

Respondents missed the entire point because their version of the record is based upon a hindsight view of the matter and an ignoring of the Petitioner's rights. This is one of the basic points of the matter. Respondents have ignored the statements of Judge Bright in his dissenting opinion on re-hearing concerning the construction-creating coverage under the insurance policy when Judge Bright stated concerning such construction (Appendix D, page A29):

> "Although this construction may be a permissible one, nothing in this record indicates that the insurance carrier should have reasonably anticipated that ruling."

And the further statements of Judge Bright concerning the decision of the Supreme Court of South Dakota in *Kunkel* v. *United Security Insurance Company of New Jersey*, 168 N.W.2d 723 (S.Ct.S.Dak., 1969) that in applying a bad faith standard in establishing an insurance liability to pay more than policy limits for refusing to settle, any factors tending to establish or negate bad faith on the part of the insurer should be considered. (Appendix D, pages A32 to A33).

Judge Bright joined Judges Gibson and Stephenson in rejecting the principal opinions' view that the policy defense should not be considered as a factor in determining whether the insurer's refusal to settle the case was in bad faith. (Appendix D, pages A33 to A34). Further, Respondents completely ignored the flat statement by Judge Bright (Appendix D, page A33):

"In light of this language of the Supreme Court of South Dakota, the majority has ignored the local law in this diversity case contrary to the mandate of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938)."

For all of the reasons stated above, as well as those in the Petition for Writ of Certiorari, it is respectfully submitted that the Writ of Certiorari should be granted.

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